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Richard M. Acey v. Litton Systems, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RICHARD M. ACEY, Plaintiff and Appellant, vs. LITTON SYSTEMS, INC., Defendant and Appellee.	**BRIEF OF THE APPELLEE** Appellate Court No. 20010132-CA District Court No. 98090411 CN Priority No. 15

Appeal from the Summary Judgment Granted by the Third District Court,
Salt Lake County, Utah, The Honorable Stephen L. Henriod

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JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUES

Litton disagrees with the statement of the issues on appeal contained in the brief submitted by Acey, and believes that Acey's statement of the issues is vague and misleading. Litton believes that the real issues to be resolved on appeal, and the applicable standards of review, are as follows:

ISSUE NO. 1: Did the trial court err in deciding that there were no genuine issues of material fact, and that, as a matter of law, the written notice that was posted by Litton regarding its intention to implement random drug testing at its Salt Lake City facility was insufficient to alter the at-will nature of Acey's employment, and to create an implied-in-fact contract limiting Litton's right to terminate Acey's employment at will, in light of the clear and conspicuous written at-will disclaimers that Litton provided to Acey?

STANDARD OF REVIEW: Whether summary judgment was properly granted is a question of law and is reviewed for correctness. Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1312 (Utah Ct. App. 1994) ("Whether summary judgment was appropriate is a question of law and we grant no deference to the trial court's decision, but review it for correctness. When reviewing a grant of summary judgment, we liberally construe all inferences that may be reasonably drawn from the facts in favor of the nonmoving party. Although the existence of an implied-in-fact employment contract is normally a question of fact left to the discretion of the jury, 'the court retains the power to decide whether, as

a matter of law, a reasonable jury could find that an implied contract exists.' 'If a reasonable jury cannot find that an implied contract exists, summary judgment is appropriate.'" (internal citations omitted).)

ISSUE NO. 2: Did the trial court err in deciding that there were no genuine issues of material fact, and that, as a matter of law, Litton did not violate any implied covenant of good faith and fair dealing when it terminated Acey's at-will employment based upon laboratory test results that indicated that the urine specimen provided by Acey in connection with a drug test had been adulterated with a substance commonly used to mask the presence of drugs?

STANDARD OF REVIEW: Whether summary judgment was properly granted is a question of law and is reviewed for correctness. Id.; Morris v. Health Net of Cal., Inc., 1999 UT 95, ¶ 5, 988 P.2d 940 ("The issues Morris raises on appeal are: whether the trial court erred in (1) applying Utah case law to an alleged breach of the covenant of good faith and fair dealing and (2) granting Health Net partial summary judgment on the question of breach of the covenant of good faith and fair dealing. Both issues present questions of law which we review for correctness without deference to the decisions of the trial court.")

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL

Litton does not believe that there are any such provisions, statutes, ordinances, rules or regulations.

STATEMENT OF THE CASE

A. Nature of the Case

This case is a wrongful termination action. During his employment with Litton, Acey was at all times an at-will employee. Litton terminated Acey's employment after Litton received the results of a drug test, which showed that a urine sample provided by Acey had been adulterated with a substance commonly used to mask the presence of drugs. Acey subsequently brought the instant action in which he asserted that his at-will employment relationship with Litton was altered or modified by an implied-in-fact contract, thereby limiting Litton's right to terminate Acey's employment at will. Acey further contends that Litton breached an implied covenant of good faith and fair dealing by terminating Acey's employment.

B. Course of Proceedings

On April 20, 1998, Acey filed his Complaint in this action asserting that Litton had wrongfully terminated his employment. (R. at 1-15.) Litton's Answer to Complaint was filed on August 26, 1998. (R. at 19-30.) On June 26, 2000, after the discovery cutoff date had passed, Litton filed its Motion for Summary Judgment. (R. at 73-75.) Acey filed his Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment and Request for Hearing on July 25, 2000. (R. at 197-257.) Litton filed its Reply memorandum In Support of Defendant's Motion for Summary Judgment on August 16, 2000. (R. at 265-276.) Oral argument on Litton's Motion for Summary Judgment was held before The Honorable Stephen L. Henriod on December 7, 2000. (R. at 285.) On that same day, the trial court issued its ruling granting Litton's Motion for

Summary Judgment. (Id.) The Order and Judgment Granting Defendant's Motion for Summary Judgment was entered by the trial court on January 12, 2001. (R. at 287-90.) Acey's Notice of Appeal was filed on February 9, 2001. (R. at 296-97.)

C. Disposition Below

Litton's Motion for Summary Judgment was granted by the trial court. The Order and Judgment Granting Defendant's Motion for Summary Judgment was entered on January 12, 2001.

D. Statement of Facts Relevant to the Issues Presented for Review[1]

1. Acey was an employee of Litton continuously from 1967 until April 8, 1997, with the exception of two short layoffs, one for approximately three months in 1968, and another for approximately three months in early 1969. (R. at 115-16, 125-26, Acey Depo. at 8-9, 32-33.)

2. During his approximately 30 years of employment with Litton, Acey never had a contract of employment with Litton, either oral or written, under which Litton agreed to employ Acey for a specific period of time. (R. at 16, Acey Depo. at 9.)

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[1] The facts set forth herein are essentially identical to the facts presented to the trial court in connection with Litton's Motion for Summary Judgment. In its Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment that was filed with the trial court on June 26, 2000 (R. at 91-196), Litton set forth a Statement of Undisputed Material Facts, in which each fact was properly supported by a citation to admissible evidence in the record (R. at 94-104) in accordance with Rule 4-501(2)(A) of the Utah Code of Judicial Administration. Significantly, as pointed out in Litton's Reply Memorandum in Support of Defendant's Motion for Summary Judgment, dated August 16, 2000 (R. at 265-76), Acey, in his opposition memorandum, candidly admitted all but two of the facts set forth in Litton's Statement of Undisputed Material Facts, and failed effectively to dispute even the two facts that he purported to dispute. (R. at 267-70.) Consequently, pursuant to Rule 4-501(2)(B), ***all*** of the facts contained in Litton's Statement of Undisputed Material Facts should properly have been – and presumably were – deemed admitted.

In his Appellant's Opening Brief, Acey's "Statement of Facts" contains various "facts" that are not properly supported by citations to admissible evidence in the record, as well as a number of assertions that are not facts at all, but rather, are mere legal conclusions and arguments. For example, in paragraphs 19 and 20 of his Statement of Facts, Acey asserts, without citation to any evidence whatsoever, that "[i]t is undisputed" that Litton did not comply with certain provisions of the "Mandatory Guidelines for Federal Workplace Drug Testing Programs." (See Appellant's Opening Brief, at 14-17.)

Similarly, in paragraphs 4, 5, 7 and 10 of his Statement of Facts, Acey asserts that Litton modified or changed its at-will employment policy when it adopted various other policies, include various policies relating to drug testing. (See id. at 8-12.) These assertions obviously are not facts, but are simply arguments and legal conclusions.

3. On or about March 26, 1992, Acey signed a document entitled "Receipt for Employee Handbook." (R. at 142-43, Acey Depo. at 114-15.)

4. The Receipt for Employee Handbook that Acey signed on or about March 26, 1992 contains the following language:

> I agree to follow the guidelines and policies contained in the Handbook and any amendments to it. It is specifically agreed that the Handbook is for informational purposes only, and that it is not a contract for, or a guarantee of, employment or continuing employment. I further understand that the Company has the right to revise the policies and practices in this Handbook at any time, with or without notice to me. No statements, representations, or actions of any employee or principal of the Company will modify these practices and procedures, unless they are in writing. The Personnel Manual contains the complete and official policies and practices upon which this Handbook is based.

(R. at 194.)

5. The Employee Handbook contains the following language:

> This Employee Handbook is not a contract for, or a guarantee of, employment or continuing employment. ***Each employee of [Litton] Guidance and Control Systems is an at-will employee, unless specifically notified otherwise in writing.*** That is, you may terminate your employment at any time, for any reason, and Guidance and Control Systems has the same right to terminate your employment at any time for any reason. ***This at-will relationship cannot be modified or changed during your employment except by specific written agreement between you and Guidance and Control Systems Division, signed by the Division's President.***

(R. at 153.) (Emphasis added.)

6. The Employee Handbook also contains the following language, all in capitalized letters:

> THE DIVISION RESERVES THE RIGHT TO MODIFY OR CHANGE ANY OF THE POLICIES OR PROCEDURES CONTAINED IN THIS HANDBOOK FROM TIME TO TIME AS MAY BE NECESSARY ***EXCEPT THAT THE AT-WILL RELATIONSHIP BETWEEN YOU AND LITTON GUIDANCE AND CONTROL SYSTEMS DIVISION IS NOT SUBJECT TO CHANGE.*** NO ORAL STATEMENTS, REPRESENTATIONS OR PRACTICES OF ANY OFFICER OR EMPLOYEE OF THE DIVISION WILL ACT TO MODIFY OR CHANGE ANY OF THESE POLICIES OR PROCEDURES. ALL CHANGES WILL BE IN WRITING.

(R. at 153.) (Emphasis added.)

7. During his employment with Litton, Acey never received any document from Litton changing the at-will employment relationship between Acey and Litton. (R. at 144-45, Acey Depo. at 116-17.)

8. During approximately the last five years of his employment with Litton, Acey held the position of factory test analyst in the G-1200 gyro area. (R. at 117-18, Acey Depo. at 11-12.)

9. The gyros produced out of the G-1200 area were used in the guidance system, the inertial navigation system, of cruise missiles and in some military aircraft. (R. at 118, Acey Depo. at 12.)

10. As a factory test analyst in the G-1200 gyro area, Acey was primarily involved in troubleshooting, repair and evaluations of problems with respect to the instruments. (R. at 118-19, Acey Depo. at 12-13.)

11. The gyros produced out of the G-1200 area were precision instruments, built according to very tight tolerances. (R. at 119, Acey Depo. at 13.)

12. In October 1995, Acey underwent drug testing at Litton, at which time he tested positive for marijuana; the test results were accurate on that occasion, and Acey had in fact used marijuana prior to the test. (R. at 129-30, Acey Depo. at 49-50.)

13. Acey has smoked marijuana on multiple occasions; at the time that his deposition was taken in this action on November 23, 1998, Acey estimated that he had smoked marijuana on 100 to 150 occasions. (R. at 131, Acey Depo. at 70.)

14. Acey first found out about Litton's plan to implement random drug testing at Litton's Salt Lake City facility in approximately May 1995 when he saw a notice regarding such drug testing posted on the bulletin board at work. (R. at 132-33, Acey Depo. at 96-97.)

15. When he saw the notice regarding Litton's plan to implement random drug testing, Acey made a photocopy of the notice to take home and show to his wife. (See R. at 133-34, Acey Depo. at 97-99.)

16. As a result of having seen the Notice on the bulletin board at work, which he copied and took home with him, Acey knew that, after he tested positive for marijuana, he would be on probation for two years, during which time he would be subject to being drug tested at any time without notice. (See R. at 136, Acey Depo. at 107.)

17. Pursuant to the drug-testing policy referenced in the Notice that was posted on the bulletin board, which Acey copied and took home with him, if an employee were to fail a drug test at any time during the two-year probationary period, the employee's employment with Litton would immediately be terminated. (R. at 150.)

18. On April 3, 1997, after he arrived at work at Litton, Acey provided a urine sample as part of a drug test administered by Litton. (R. at 121, Acey Depo. at 15.)

19. In connection with providing the urine sample on April 3, 1997, Acey told the nurse who was collecting the urine sample that he had been very ill and that he had been taking some prescription medication for a knee injury; while Acey was telling the nurse about his illness and the prescription medications that he had been taking, the nurse did not try to cut him off in any way. (See R. at 122-23, 124, Acey Depo. at 20-21, 24.)

20. The urine sample that Acey provided on April 3, 1997 was tested by a drug-testing company called Northwest Toxicology. (R. at 76-79, John Aff. at 2, ¶ 5; R. at 80-90, Kuntz Aff. at 1, ¶ 3, at 2, ¶ 5; R. at 127, Acey Depo. at 44.)

21. Upon testing the urine sample provided by Acey on April 3, 1997, Northwest Toxicology reported to Litton that the urine sample had tested positive for nitrites. (See R. at 78; John Aff. at 2, ¶ 5.)

22. The test performed by Northwest Toxicology revealed that the urine specimen was positive for nitrites at a concentration of 688 micrograms per milliliter (mcg/ml); as of April 1997 when the test was performed, Northwest Toxicology had conducted studies that led it to believe that the level of nitrites contained in Acey's urine sample – 688 micrograms per milliliter (mcg/ml) – was above any possible amount of nitrites that could have been generated naturally (see R. at 262, Supp. Kuntz Aff. at 2, ¶ 3.); subsequently, in September 1998, the National Laboratory Certification Program promulgated its Program Document #35 in which it established a standard of 500 mcg/ml minimum concentration of nitrites for determining when a sample is to be reported as adulterated; in other words, under Program

Document #35, when a sample contains 500 mcg/ml or more of nitrites, it should be reported as adulterated. (Id.)

23. Based on the test results from Northwest Toxicology, Litton terminated Acey's employment on April 8, 1997. (R. at 70-71, Garrard Aff. ¶¶ 4-6.)

24. The only reason that Litton terminated Acey's employment was that Litton believed, based on the test results from Northwest Toxicology, that Acey's urine sample had been adulterated, coupled with the fact that Acey had previously tested positive for marijuana. (R. at 71, Garrard Aff. ¶ 6; R. at 127-28, Acey Depo. at 44-45.)

SUMMARY OF ARGUMENTS

I. Fundamentally, the issue in this case is whether, in the face of multiple, explicit, clear and conspicuous at-will disclaimers contained in Litton's Employee Handbook, Acey could nevertheless reasonably believe that Litton intended to relinquish its longstanding at-will employment policy when it announced its plan to implement random drug testing at its Salt Lake City facility. Under Utah law, the answer to this question is no. Under Utah law, when an employee handbook contains a clear and conspicuous at-will disclaimer, any other alleged agreement, promise, representation or conduct must be construed in light of the disclaimer. Acey failed to provide the trial court with any sound reason for the court to disregard the clear and conspicuous at-will disclaimers contained in Litton's Employee Handbook. Acey failed to cite even a single Utah case that supported his claim that, notwithstanding the clear and conspicuous at-will disclaimers contained in Litton's Employee Handbook, Acey could nevertheless have

reasonably believed that Litton intended to relinquish its at-will policy when it announced its plan to implement random drug testing.

II. It is well established that, under Utah law, there can be no implied covenants or obligations that differ from, or are inconsistent with, the express terms of the underlying contract. Moreover, a number of decisions by the Utah Supreme Court and the Utah Court of Appeals have held that the implied covenant of good faith and fair dealing does not limit or restrict an employer's right to terminate an at-will employee. During his employment with Litton, Acey was at all times an at-will employee. Accordingly, any implied covenant of good faith and fair dealing that may have existed did not in any way preclude or restrict Litton from terminating Acey based upon Litton's reasonable belief that Acey's urine specimen had been adulterated.

ARGUMENT

I. SUMMARY JUDGMENT ON ACEY'S CLAIM FOR BREACH OF AN IMPLIED-IN-FACT CONTRACT WAS PROPER BECAUSE NO REASONABLE JURY COULD HAVE FOUND THAT AN IMPLIED-IN-FACT CONTRACT EXISTED LIMITING LITTON'S RIGHT TO TERMINATE ACEY'S EMPLOYMENT.

The trial court below properly entered summary judgment in favor of Litton. No reasonable jury could have found that Acey's at-will employment had been altered or modified by virtue of the fact that Litton posted a written notice of its intention to

implement random drug testing at its Salt Lake City facility.[2] Accordingly, this Court should affirm the trial court's entry of summary judgment.

The pertinent analysis begins with the presumption that an employee hired for an indefinite period is an at-will employee. See Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 333 (Utah 1992); Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991). Further, the party challenging the at-will presumption has the "burden of establishing the existence of an implied-in-fact contract provision[.]" Johnson, 818 P.2d at 1001 (footnote omitted). Moreover, when "an employee handbook contains a clear and conspicuous disclaimer of contractual liability, any other agreement must be construed in light of the disclaimer." Hodgson, 844 P.2d at 334 (citing Johnson, 818 P.2d at 1003). Indeed, as stated by the Utah Supreme Court, "[a]n express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature." Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980); see also Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989) ("[a]n implied-in-fact promise cannot, of course, contradict a written contract term."); Kreimeyer v. Hercules, Inc., 892 F. Supp. 1374, 1377 (D. Utah 1994) ("Of course, an implied-in-fact promise cannot contradict a written contract term.") Accordingly, "[a]n employee handbook may create binding terms only if those terms are consistent with the meaning

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[2] Litton had implemented a company-wide drug-testing program years earlier, which did not include random testing, but in 1995, it decided to implement random testing at its Salt Lake City facility.

of the contract as a whole." Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 335 (Utah 1992). In short:

> [F]or an implied-in-fact contract term to exist, it must meet the requirements for a unilateral contract. There must be a manifestation of the employer's intent that is communicated to the employee and ***sufficiently definite to operate as a contract provision***. Furthermore, ***the manifestation of the employer's intent must be of such a nature that the employee can reasonably believe that the employer is making an offer of employment other than employment at will.***

Johnson, 818 P.2d at 1002 (footnotes omitted; emphasis added).

In Hodgson, the Utah Supreme Court found that a breach of contract claim was properly dismissed because the employee handbook at issue made clear that employees were at-will. The court made this determination even though the plaintiff's manager told her in a pre-employment interview that the company followed "disciplinary procedures," and even though the company subsequently issued warnings to four other employees. Id. at 333. The Court rejected the plaintiff's argument that this conduct created an implied-in-fact contract such that she could be discharged only after receiving notice to improve her performance. Id.

Following the same reasoning, Utah courts have repeatedly upheld dismissals of implied contract claims in circumstances where an employee handbook contains a clear and conspicuous disclaimer. See, e.g., Johnson, 818 P.2d at 1002-03 (affirming dismissal of implied contract claim where handbook contained the statement, "Your employment is for no set period and may be terminated without notice and at will at any time by you or the company."); Hodgson, 844 P.2d at 334-35; Kirberg v. West One Bank, 872 P.2d 39,

41 (Utah Ct. App. 1994) (affirming summary judgment on the basis of at-will statements in a handbook); Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1313 (Utah Ct. App. 1994) (affirming summary judgment because "[i]n the Handbook, Mrs. Fields unequivocally reserved its at-will employer status. . . . Therefore, Trembly could not have reasonably concluded, after distribution of the Handbook, that his employment was other than at-will [on the basis of an oral statement made to him].").

In the present case, it is undisputed that Acey's employment with Litton was at all times for an indefinite term. (Statement of Facts ¶ 2.) Additionally, on or about March 26, 1992, Acey signed a "Receipt for Employee Handbook" in which he expressly agreed to follow the guidelines and policies contained in the Employee Handbook. (Id. ¶ 4.) Included in the Employee Handbook was the following statement:

> This Employee Handbook is not a contract for, or a guarantee of, employment or continuing employment. ***Each employee of [Litton] Guidance and Control Systems is an at-will employee, unless specifically notified otherwise in writing.*** That is, you may terminate your employment at any time, for any reason, and Guidance and Control Systems has the same right to terminate your employment at any time for any reason. ***This at-will relationship cannot be modified or changed during your employment except by specific written agreement between you and Guidance and Control Systems Division, signed by the Division's President.***

(Statement of Facts ¶ 5 (emphasis added).) Significantly, there is no "specific written agreement" between Acey and Litton, signed by Litton's President, which modified or changed Acey's at-will employment status. Even more importantly, the Employee Handbook also contained the following language, all in capitalized letters:

> THE DIVISION RESERVES THE RIGHT TO MODIFY OR CHANGE ANY OF THE POLICIES OR PROCEDURES CONTAINED IN THIS HANDBOOK FROM TIME TO TIME AS MAY BE NECESSARY ***EXCEPT THAT THE AT-WILL RELATIONSHIP BETWEEN YOU AND LITTON GUIDANCE AND CONTROL SYSTEMS DIVISION IS NOT SUBJECT TO CHANGE.*** . . .

(Statement of Facts ¶ 6 (emphasis added).) In light of this provision, no Litton employee could ***reasonably*** believe that Litton's at-will policy was subject to change. It was the one truly immutable principle governing the employment relationship between Litton and its employees. Indeed, in his deposition, Acey candidly admitted that, during his employment with Litton, he never received any document from Litton changing the at-will relationship between Plaintiff and Litton. (Statement of Facts ¶ 7.)

Despite the express at-will disclaimers in the Employee Handbook, as well as Acey's candid admission that he never received any document from Litton altering the at-will relationship, Acey contended before the trial court that Litton relinquished its right to terminate Acey at will. Acey's argument was based – in essence – on a single sentence found on the second page of the two-page notice that was posted on the bulletin board at Litton's facility in approximately May 1995, notifying the employees of Litton's plan to implement random drug testing beginning on July 17, 1995.[3] The notice was signed by Mel Ashcraft, who at that time was Litton's Vice-President of Operations. The sentence upon

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[3] Acey also argues that Litton modified the at-will policy articulated in the Employee Handbook that it issued in ***1992*** by adopting its drug-testing policies in ***1990***. (See Appellant's Opening Brief, at 8-12, 25, 32.) This "back to the future" logic is mystifying. Even assuming, *arguendo,* that Litton's adoption of certain drug-testing policies in 1990 raised some question about whether Litton intended to continue to maintain and follow its long-standing policy of at-will employment, Litton unequivocally put to rest any confusion regarding that issue when it issued the 1992 Employee Handbook.

which Acey relied in support of his implied-in-fact contract claim stated: "As a defense contractor, it is our obligation to comply with federal law regarding maintaining a drug free workplace." (R. at 51.) Significantly, nothing in the two-page notice *expressly* addressed, or even mentioned, the possibility of possible adulteration of test specimens by employees, or the possible discipline that Litton would impose if it believed that an employee had adulterated his or her test specimen. (R. at 150-51.) The notice, however, indicated that if an employee refused to take a drug test when requested to do so, such refusal would "be treated as insubordination and will subject the employee to severe disciplinary action, including termination." (R. at 151.)

The notice posted on the bulletin board regarding random drug testing, when construed in light of the explicit and conspicuous at-will disclaimers contained in Litton's Employee Handbook, was simply not "sufficiently definite to operate as a contract provision," and was not of such a nature that Acey could ***reasonably*** have believed that Litton was making an offer of employment other than employment at will. See Johnson, 818 P.2d at 1002; see also Robertson v. Utah Fuel Co., 889 P.2d 1382, 1386-87 (Utah App. 1995) (employer's substance abuse policy – under which any employee who voluntarily came forward, prior to employer administering drug test, to request help in resolving alcohol, drug or other substance abuse problem, would be offered rehabilitation assistance – could not reasonably have been understood by plaintiff as offer to change

plaintiff's employment to something other than at-will).[4] Nothing in the notice indicates that, by adopting random drug testing, Litton was suddenly abandoning its longstanding at-will employment policy. Moreover, nothing in the federal regulations cited by Acey indicated that, if an employer failed to comply with any particular provision of the regulations, it thereby relinquished its right to terminate its employees on an at-will basis. Additionally, Acey's interpretation of the notice is inconsistent with, and contradicts, the express and unambiguous at-will disclaimers contained in the Employee Handbook. Accordingly, under the principle articulated in Rio Algom, such an interpretation is prohibited. For these reasons, summary judgment was properly entered by the trial court.

II. SUMMARY JUDGMENT ON ACEY'S CLAIM FOR BREACH OF AN IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WAS PROPER BECAUSE UTAH LAW DOES NOT RECOGNIZE SUCH A CLAIM IN THE AT-WILL EMPLOYMENT CONTEXT FOR PURPOSES OF LIMITING OR RESTRICTING AN EMPLOYER'S RIGHT TO TERMINATE AN AT-WILL EMPLOYEE.

Likewise, the trial court properly entered summary judgment on Acey's claim for breach of the implied covenant of good faith and fair dealing. Indeed, Acey's claim failed as a matter of law because, under Utah law, there cannot be an implied covenant

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[4] Acey's reliance on the Robertson decision (see Appellant's Brief at 30-31) is misplaced, and his characterization of that case is inaccurate. Contrary to Acey's assertions, the Utah Court of Appeals in Robertson did ***not*** find that an employer's adoption of a drug policy modified its employees' at-will employment status, or that such drug policy established an implied-in-fact contract term that limited the employer's right to terminate its employees at will. Rather, the court in Robertson specifically held that the employees in Robertson could not possibly have reasonably believed that the adoption of the drug policy had altered their at-will employment. Robertson, 889 P.2d at 1386. Moreover, the plaintiff in Robertson argued that it was also the oral representations of his supervisors, and not merely the written drug policy itself, that purportedly altered the employee's at-will employment. Id. at 1385-87.

obligation that is different from or inconsistent with the terms of the underlying contract itself. Consequently, an at-will employment relationship cannot give rise to an implied covenant that is contrary to the rule of at-will employment. See Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991) ("The covenant of good faith . . . cannot be construed to change an indefinite-term, at-will employment contract into a contract that requires an employer to have good cause to justify a discharge.").

The Utah Supreme Court and the Utah Court of Appeals have repeatedly rejected claims in which plaintiffs have argued that an implied covenant of good faith and fair dealing somehow limited an employer's right to terminate at-will employees. See, e.g., Fox v. MCI Communications Corp., 931 P.2d 857, 859 n.3 (Utah 1997) ("This Court has expressly rejected" the proposition that employment contracts should be construed as containing an implied covenant of good faith and fair dealing that places an "additional restriction on the right of employers to terminate at-will employees"); Sanderson v. First Sec. Leasing Co., 844 P.2d 303, 308 (Utah 1992) ("[W]e have refused to recognize an implied-in-law covenant of good faith and fair dealing that creates a for-cause standard for dismissal."); Heslop v. Bank of Utah, 839 P.2d 828, 840 (Utah 1992) (dismissing an implied covenant claim and "definitively refus[ing] to recognize an implied-in-law covenant of good faith that would replace the traditional at-will rule in employment cases."); Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 335 (Utah 1992) (finding that an implied covenant of good faith and fair dealing cannot be applied to an at-will employment relationship because "an implied covenant cannot be used to alter the rights agreed to by the parties."); Loose v. Nature-All Corp., 785 P.2d 1096, 1098 (Utah 1989)

("Utah law does not recognize a cause of action for violation of a covenant of good faith and fair dealing" in the employment context).

Acey asserted that Litton breached some alleged implied covenant by allegedly failing to verify the accuracy of the test results that showed that Acey's urine sample had been adulterated with nitrites.[5] (See R. at 218, 220.) Acey's entire argument was predicated on the erroneous assumption that the federal drug-testing regulations upon which Acey relied in support of his implied-in-fact contract claim became part of the employment *contract* between Acey and Litton. In this regard, his implied covenant claim fails for the same reasons that his implied-in-fact contract claim fails, which are discussed in detail above.[6]

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[5] Acey's assertion that Litton "did nothing to verify its assumption or belief that Mr. Acey adulterated his sample" (Appellant's Brief at 35) is flatly inaccurate. Indeed, after Acey raised some question about the accuracy of the test results, Northwest Toxicology tested Acey's urine specimen a second time. (R. at 302, L000518.) Again, the test confirmed the results of the first test, and confirmed the existence of nitrites in Acey's urine sample in an amount substantially greater than any amount that could have occurred naturally, without any adulteration. (Id.)

[6] Acey's citation of the Work Force Appeals Board decision for the proposition that there were "plausible explanations for the presence of nitrites" in his urine sample is both misplaced and irrelevant. Significantly, any findings of fact or conclusions that may have been reached by the Work Force Appeals Board decision are, by statute, neither conclusive nor binding in this action. Utah Code Ann. § 35A-4-508(6)(b) (1997). Moreover, the Work Force Appeals Board decision was based upon the Board's determination in that proceeding that Litton had failed to proffer admissible evidence regarding the testing procedure and the effect and meaning of the test results. (R. at 257-58.) By contrast, in the instant action, Litton produced ample admissible evidence to the trial court regarding the testing procedures and the test results. (R. at 76-79, John Aff.; R. at 80-90, Kuntz Aff.; R. at 261-64, Kuntz Supp. Aff.; R. at 302, NWT Drug Testing Urinalysis Drug Testing Documents Package filed under seal with trial court.) Additionally, whether Acey himself did or did not adulterate his urine specimen was entirely irrelevant to Litton's Motion for Summary Judgment. Indeed, the trial court

Moreover, no matter how Acey attempts to characterize his implied covenant claim in an effort to circumvent the large body of Utah case law directly on point, Acey's claim attempts to do exactly what Utah law prohibits: it attempts to put restrictions upon, or otherwise limit, Litton's right to terminate an at-will employee. Utah courts have repeatedly rejected such claims. See, e.g., Sanderson v. First Sec. Leasing Co., 844 P.2d 303, 308 (Utah 1992); Heslop v. Bank of Utah, 839 P.2d 828, 840 (Utah 1992); Hodgson v. Bunzl Utah, Inc., 844 P.2d 331, 335 (Utah 1992); Brehany v. Nordstrom, Inc., 812 P.2d 49, 53, 55-56 (Utah 1991); Loose v. Nature-All Corp., 785 P.2d 1096, 1098 (Utah 1989). In the lower court proceeding, Acey did not even attempt to distinguish these cases in his opposition memorandum, nor has he attempted to do so in his opening brief here.[7]

Because Acey was an at-will employee at Litton, he could not, and cannot, state a breach of implied covenant claim based upon the termination of his employment. Litton was entitled to judgment as a matter of law on Acey's claim for breach of an implied covenant of good faith and fair dealing. This Court should uphold the summary judgment entered by the trial court below.

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made no factual determination regarding whether Acey did or did not adulterate his specimen. The salient point was, and is, that Litton was entitled to terminate Acey's employment for no reason, or any reason, including Litton's belief, mistaken or not, that Acey's urine specimen had been adulterated.

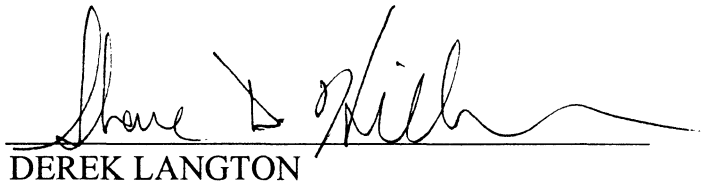
[7] Moreover, the only Utah case upon which Acey relies in support of his implied covenant claim, Cook v. Zions First National Bank, 919 P.2d 56 (Utah App. 1996), does not support Acey's contentions. Indeed, Cook did not even involve the *termination* of employment of an employee. Rather, the plaintiff in Cook sued Zions, while still an employee of Zions, because of Zions' alleged failure to comply with the contractually agreed upon sick leave program. Accordingly, Cook is completely inapposite, and provides no support for Acey's implied covenant claim in the present case.

CONCLUSION

The trial court's grant of summary judgment should be affirmed. This Court should rule that the trial court did not err in deciding that Acey's at-will employment status was not modified by Litton's decision to implement random drug testing, particularly in light of Litton's explicit at-will disclaimers. Additionally, this Court should rule that the trial court did not err in deciding that the implied covenant of good faith and fair dealing did not preclude Litton from terminating Acey based upon Litton's reasonable belief Acey's urine specimen had been adulterated.

DATED this 1st day of August, 2001.

PARSONS BEHLE & LATIMER



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CERTIFICATE OF SERVICE

I, Derek Langton, hereby certify that on this 5th day of August, 2001, I caused to be served two copies of the foregoing **BRIEF OF THE APPELLEE** upon David J. Holdsworth, the counsel for the appellant, by mailing them to him by first class mail with sufficient postage prepaid to the following address:

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